DUTY OF CARE — MISFEASANCE AND NONFEASANCE — MORAL DUTY. — The plaintiff, intending to become a passenger, jumped upon the step of a closed, vestibuled car of a moving train and clung to the handbars. Later the attention of the conductor was called to the plaintiff's condition, but he did not open the door and the plaintiff finally dropped off from exhaustion. He now sues the conductor and the railway company for his resultant injuries. *Held*, that he may take judgment against both. *Southern Ry. Co.* v. *Sewell*, 90 S. E. 94 (Ga.).

As the plaintiff had not put himself in the proper place for the carriage of passengers, it would seem that he was a trespasser and not a passenger. *Merrill* v. *Eastern R. Co.*, 139 Mass. 238, 1 N. E. 548; *Illinois Central R. Co.* v. *O'Keefe*, 168 Ill. 115, 48 N. E. 294. The court then decides that the conduct of the defendants was misfeasance. As the train was moving when boarded by the plaintiff and its motion did not throw him off, it is difficult to find any action by the defendants, after the plaintiff was seen, which caused the accident. The only basis of liability would seem to be a nonfeasance. But there is no legal duty to act, except such as may arise from legal relations. See James Barr Ames, "Law and Morals," 22 HARV. L. REV. 97, 111–13. However, some courts, while ostensibly recognizing this rule, have, in effect, imposed affirmative duties where no relation existed. Thus, where one had made a gratuitous promise to effect the cancellation of an insurance policy, but did not take steps to do so, he was held liable for the resultant loss, the court calling his conduct misfeasance. *Condon* v. *Exton-Hall Brokerage & Vessel Agency*, 80 Misc. 369, 142 N. Y. Supp. 548. Again, under the guise of estoppel, an affirmative duty has been placed upon the apparent maker of a forged note to warn parties, relying on his apparent credit, of the forgery. *Urquhart* v. *Bank of Scotland*, 9 Scot. L. R. 508; *Ewing* v. *Dominion Bank*, 35 Can. Sup. Ct. 133. See 26 HARV. L. REV. 349. It has been suggested that a legal duty should be imposed to take positive steps to remove a peril innocently created or to mitigate an injury innocently caused. See F. H. Bohlen, "The Moral Duty to aid Others as a Basis of Tort Liability," 56 U. OF PA. L. REV. 217. In the principal case the conductor had, without fault, contributed to the dangerous situation by increasing the speed of the train. Accordingly, under this theory he would be under a duty to aid the plaintiff. And as this duty arose out of the employment, by the speeding up of the train, the railroad may well be liable for its breach. But if, after all, the duty is simply one of assistance whenever ethical standards demand it, the conductor seems to owe it as a human being merely, and not as a servant of the railroad. It would seem that the imposition of affirmative duties is more properly the function of legislation than of judicial decision. If, however, the courts contemplate the incorporation of moral duty into the law, it is advisable that they do so openly, and that its extent and limitations be clearly defined.

ECCLESIASTICAL LAW — HOW FAR ADOPTED IN THE UNITED STATES — LEGAL SEPARATION. — In a suit for absolute divorce, the lower court decreed a legal separation. A statute empowered the court to grant divorce from the bonds of matrimony, but made no provision for a legal separation. On appeal, *held*, that the ecclesiastical law, allowing divorce from bed and board, was not adopted as part of the common law. *Hodges* v. *Hodges*, 159 Pac. (N. M.) 1007.

For discussion of this case, see NOTES, p. 283.

EQUITY — RECEIVER — JURISDICTION TO APPOINT A RECEIVER WHEN SUCH APPOINTMENT IS THE SOLE OBJECT OF THE SUIT. — An individual with assets of about $70,000,000, chiefly in land, and liabilities of $22,000,000, of which $15,000,000 was secured, and $7,000,000 unsecured, became financially embarrassed for ready money to meet his obligations. Two of the unsecured creditors brought suit for a receiver, alleging the above facts and that, if the

secured creditors enforced their claim against the property, the unsecured creditors must go unpaid, while on the other hand, if the secured creditors held off for a time, in all probability all would be paid. *Held*, that a receiver be appointed. *Thompson's Receivership*, 44 Pa. County Ct. 518.

For a discussion of the principles involved in this decision, see Notes p. 273.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — ALLOWANCE FOR COUNSEL FEES INCURRED IN DEFENCE OF BEQUEST. — A petition was filed for allowance from the estate for fees of counsel employed by executor to defend certain charitable bequests subsequently declared void. *Held*, that the petition be denied. *Arnold's Estate*, 64 Pitts. L. J. 596.

The argument is that an executor may not charge the estate unless he is acting in the interest of those eventually found to be entitled to the property. Originally an executor derived his authority entirely from the will. He acted as the representative of the deceased to carry out his wishes. Modern procedure merely requires the sanction of the court to this appointment and does not change the purpose. It would seem then that it was not only the privilege but the duty of the executor to defend the validity of the bequests and of the whole will. *Compton* v. *Barnes*, 4 Gill (Md.) 55; *Bradford* v. *Boudinot*, 3 Wash. (U. S. C. C.) 122; *Succession of Heffner*, 49 La. Ann. 407, 21 So. 905; *In re Title, Guaranty & Trust Co.*, 114 App. Div. 778, 100 N. Y. Supp. 243. Wherefore he may defend a bequest even against the wishes of the legatees interested therein. *Reed* v. *Reed*, 74 S. W. 207 (Ky.). But he must be *bonâ fide* in the belief that there is a reasonable chance of upholding the bequest. *Henderson* v. *Simmons*, 33 Ala. 291; *Bratney* v. *Curry*, 33 Ind. 399; *Bowden* v. *Higgs*, 77 Tenn. 343. However, there is authority in support of the principal case, that the executor is acting in behalf of the legatees, and not for the testator. Under such theory it must follow that his recovery for counsel fees against the estate is limited to the interest in the estate of the legatee for whom he has acted. *Koppenhaffer* v. *Isaacs*, 7 Watts (Pa.) 170. And he can have no charge upon the estate if unsuccessful. *Kelly* v. *Davis*, 37 Miss. 76. But a special provision in the will desiring the expenses of defending a bequest to be paid out of the estate must surely protect the executor. The *dictum* of the court that such a provision would be void if the bequest was void is difficult to sustain. For there can be no public policy against testing one's legal rights in court.

INTERSTATE COMMERCE — COMPETITION — REVIEW OF COMMISSION'S ORDERS. — The Panama Canal Act provided a heavy daily penalty for the operation after a certain date of steamship lines found by the Interstate Commerce Commission to be in competition with railroads which owned them. The Lehigh Valley Railroad petitioned the Commission, before the date from which the penalties under the Act were to run, to declare that there was no competition between the railroad and its steamers. After two hearings in which the Commission found as a fact that such competition existed, the railroad brought a bill in equity asking the District Court to enjoin the Commission's order, which had refused, on the ground of the competition found, to declare that the railroad might run its boats without penalty. *Held*, that the prayer be denied. *Lehigh Valley R.* v. *U. S.*, 234 Fed. 682.

The position of the Interstate Commerce Commission as a fact-finding body is put in question. Without a binding statutory declaration the conception has become crystallized that the orders of the Commission as an administrative body made after hearing evidence are reviewable only in so far as they exceed the Commission's statutory authority, violate a constitutional provision, reveal a mistake in law, or transcend the bounds of reason. *I. C. C.* v. *Ill. Cent. R.*, 215 U. S. 452; *I. C. C.* v. *Union Pacific*, 222 U. S. 541; *I. C. C.* v. *Louisville, etc. R.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294. See